

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34511-4-III

STATE OF WASHINGTON, Respondent,

v.

SEAN MICHAEL HEALY, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED.....	ii
<u>I. INTRODUCTION.....</u>	1
<u>II. ASSIGNMENTS OF ERROR.....</u>	1
<u>III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	1
<u>IV. STATEMENT OF THE CASE.....</u>	2
<u>V. ARGUMENT.....</u>	5
<u>VI. CONCLUSION.....</u>	11
<u>CERTIFICATE OF SERVICE</u>	12

AUTHORITIES CITED

Federal Cases

<i>Dunaway v. New York</i> , 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979).....	6
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	6
<i>U.S. v. Mariscal</i> , 285 F.3d 1127 (9th Cir. 2002).....	7

State Cases

<i>State v. Aase</i> , 121 Wn. App. 558, 89 P.3d 721 (2004).....	5
<i>State v. Barnes</i> , 96 Wn. App. 217, 978 P.2d 1131 (1999).....	10
<i>State v. Doughty</i> , 170 Wn.2d 57, 239 P.3d 573 (2010).....	9
<i>State v. Duncan</i> , 146 Wn.2d 166, 43 P.3d 513 (2002).....	7, 8, 9
<i>State v. Gaddy</i> , 152 Wn.2d 64, 93 P.3d 872 (2004).....	6
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	5
<i>State v. Hobart</i> , 94 Wn.2d 437, 617 P.2d 429 (1980).....	6
<i>State v. Kohler</i> , 70 Wn.2d 599, 424 P.2d 656 (1967).....	6
<i>State v. King</i> , 89 Wn. App. 612, 949 P.2d 856 (1998).....	7
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999).....	5
<i>State v. Malone</i> , 106 Wn.2d 607, 724 P.2d 364 (1986).....	10
<i>State v. O'Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	5
<i>State v. White</i> , 97 Wn.2d 95, 640 P.2d 1061 (1982).....	6

Statutes

RCW 10.31.100.....	6
--------------------	---

I. INTRODUCTION

Sean Healy appeals from the denial of his motion to suppress evidence obtained as the result of an unlawful detention. Because police did not have probable cause to believe he was committing a crime, and because police may not use a *Terry* detention to investigate a civil infraction, the order denying the motion to suppress should be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in denying Healy's motion to suppress.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Did police have cause to detain Healy for urinating in public when he was observed standing outside at night in a party neighborhood but police never observed unzipped pants or any urine?

ISSUE NO. 2: Did police have cause to detain Healy for consuming or possessing alcohol as a minor when, at the time of the detention, police did not see him in possession of alcohol or observe any effects of consuming alcohol?

ISSUE NO. 3: Did police have cause to detain Healy for obstructing a law enforcement officer when the officer was performing an unlawful detention?

IV. STATEMENT OF THE CASE

The setting of this case is College Hill in Pullman, Washington, an established party neighborhood. RP 12-13. On a Thursday evening in April, Officer Alexander Gordon was on routine patrol. RP 5, 12. While on College Hill, around 11:20 p.m., he saw a man standing behind a garbage dumpster outside of a house where a party appeared to be ongoing. RP 19-20. The man was standing with his legs apart, head down, and hands near his waist in a position men often assume when urinating, although Gordon acknowledged men sometimes hold their cell phones in a similar stance. RP 5, 15, 19. Gordon did not see the man's penis, nor any urine, nor did he ever testify to observing the man adjusting his clothing in any way, and he admitted he did not know if the man was actually urinating. RP 44, 64.

When Gordon got out of his car but before he said anything, the man ran. RP 20. Gordon pursued him on foot and commanded him to stop, stating he would tase him. RP 21, 48. After about half a block, the man stopped and cooperated, answering Gordon's questions. RP 21, 41-

42, 54. Gordon handcuffed the man, whom he identified as Sean Healy, and read him *Miranda* warnings. RP 30. After advising him of his rights, Gordon smelled alcohol on Healy and learned that he was under age 21. RP 60. He then placed Healy under arrest. RP 120.

Healy had been carrying a bag of chips during the encounter, which he dropped when Gordon contacted him and told him to put his hands on the wall. RP 120, 122. Gordon looked inside the bag and saw a small plastic baggie inside that contained a white powder. RP 120-21.

The State charged Healy with possessing a controlled substance and being a minor in possession with alcohol. CP 1-2. Pretrial, Healy moved to suppress evidence obtained from his detention, arguing that a *Terry* investigative detention is not permitted when the defendant is only suspected of committing a civil infraction, like urinating in public. CP 18-19. Because performing an illegal detention is not an official police duty, Healy contended that failing to stop when Gordon pursued him could not justify a detention for obstructing a law enforcement officer. CP 20.

At an evidentiary hearing on the motion, Gordon acknowledged he contacted Healy to investigate his suspicion that Healy was urinating in public, that there was no offense of “attempted” urinating in public, and that no infraction has occurred unless the suspect has actually urinated.

RP 24, 38-39, 54, 63-64. Nevertheless, Gordon argued that he had reasonable suspicion to investigate Healy for being a minor in consumption of alcohol, based on generalized allegations about the nature of the neighborhood and his belief that people who flee are always underage or committing some other crime. RP 25-28, 52-53. However, he admitted Healy did not necessarily appear to be under 21, was not in possession of any alcohol containers, and he did not observe any physical effects of alcohol consumption until after detaining Healy. RP 26-27, 51, 57, 60.

The trial court denied the motion, holding that Gordon had probable cause to cite Healy for urinating in public and developed probable cause to arrest him for obstructing when he ran. RP 87, 89. It further held that Healy's flight made it reasonable to believe he was committing some other crime like consuming alcohol while a minor. RP 88. It entered findings of fact and conclusions of law supporting its ruling. CP 79-82.

A jury subsequently convicted Healy, and the trial court sentenced him to community service and declined to place him on community custody. RP 243, 253, 255; CP 86. Healy now timely appeals, and has been found indigent for that purpose. CP 97, 115.

V. ARGUMENT

The sole issue presented on appeal is the trial court's ruling denying Healy's motion to suppress evidence. Because the trial court erred in concluding from the facts presented that Gordon had a basis to detain Healy based on his brief observation that Healy might have been urinating next to the garbage can, the order denying Healy's motion to suppress should be reversed.

In reviewing the denial of a defendant's motion to suppress evidence, the Court of Appeals determines whether the factual findings are supported by substantial evidence and reviews *de novo* the trial court's conclusions of law. *State v. Aase*, 121 Wn. App. 558, 564, 89 P.3d 721 (2004). Evidence is "substantial" when it is sufficient to convince a fair-minded person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Here, Healy does not challenge the trial court's findings, only its legal conclusions. Accordingly, review is *de novo*.

A warrantless seizure of a person is per se unconstitutional unless one of the few "jealously and carefully drawn" exceptions to the warrant requirement applies. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833

(1999). Under the Fourth Amendment to the U.S. Constitution, law enforcement officers may not seize an individual unless there is probable cause to believe the person has committed a crime. *Dunaway v. New York*, 442 U.S. 200, 207-08, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). Probable cause is an objective standard, based upon all of the facts and circumstances available to the officer at the time of the arrest. *See State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004); *State v. Kohler*, 70 Wn.2d 599, 605, 424 P.2d 656 (1967).

Additionally, in Washington, police have authority to arrest a suspect on probable cause for a misdemeanor offense without a warrant only when the suspect has committed the crime in the officer's presence, or when the crime involves specified offenses including possession or consumption of alcohol by a minor. RCW 10.31.100.

Under the U.S. Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), an officer may briefly detain a person whom he reasonably suspects of criminal activity for limited questioning. *State v. White*, 97 Wn.2d 95, 105, 640 P.2d 1061 (1982) ("[T]o justify the initial stop the officer must be able to point to specific and articulable facts that give rise to a reasonable suspicion that there is criminal activity afoot."); *State v. Hobart*, 94 Wn.2d 437, 441, 617

P.2d 429 (1980); *State v. King*, 89 Wn. App. 612, 618, 949 P.2d 856 (1998) (“[I]t is reasonable for an officer to detain a person briefly, for investigation, if the officer harbors a reasonable suspicion, arising from specific and articulable facts, that criminal activity is afoot.”).

When an officer detains a person for a civil or traffic infraction on objective facts that fail to constitute a violation, then there is a lack of reasonable suspicion to justify a stop. *U.S. v. Mariscal*, 285 F.3d 1127, 1130 (9th Cir. 2002). “If an officer simply does not know the law, and makes a stop based on objective facts that cannot constitute a violation, his suspicions cannot be reasonable. The chimera created by his imaginings cannot be used against the driver.” *Id.*, citing *U.S. v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000).

Washington courts have long established that *Terry* detentions are not authorized for civil investigations. In *State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513 (2002), police approached three men standing near a bush shelter near a brown paper bag with a bottle neck protruding. The officers approached the shelter, located a cold bottle of beer inside the bag, and spoke to the men, all of whom denied drinking the beer. The officers decided to cite Duncan for possessing an open container in public, a civil infraction. They frisked him, discovered a firearm in his waistband as

well as other contraband, and arrested him for various crimes. *Id.* at 169-70.

The Washington Supreme Court reversed Duncan's conviction, holding that the *Terry* exception to the search warrant requirement does not apply to investigate a civil infraction but only criminal violations and traffic violations. *Id.* at 172, 173-74. Evaluating the principles justifying the *Terry* exception, the Duncan court noted that the State's interest in investigating civil matters is considerably less substantial than criminal investigations, thereby failing to justify the degree of individual intrusion tolerated by *Terry* for crime-prevention purposes:

Accepting the presumption that more serious crimes pose a greater risk of harm to society, we place an inversely proportional burden in relation to the level of the violation. Thus, society will tolerate a higher level of intrusion for a greater risk and higher crime than it would for a lesser crime.

Id. at 177.

The present case falls squarely within *Duncan*. Gordon acknowledged repeatedly that his purpose in contacting Healy was to investigate whether he had urinated in public, and he did not have a basis to cite Healy for the infraction without confirming that he had actually urinated. RP 24, 44, 46, 47, 48, 53, 54, 63, 64. Absent confirmation that a

citable violation occurred, Gordon had no lawful justification to detain Healy in order to cite him. The potential offense reflected a “lower risk to society” such that Healy’s competing liberty interests outweighed Gordon’s desire to detain him for investigation of his activities. *Duncan*, 146 Wn.2d at 177.

Gordon claimed, and the trial court concluded, that Healy’s actions in possibly urinating and running to avoid contact with Gordon established reasonable suspicion to believe he was committing the crime of exhibiting the effects of consuming alcohol while a minor. But reasonable suspicion must be based upon individualized information, not general observations about the character of the neighborhood and the behavior of college students. Here, Gordon acknowledged he saw no alcohol container, had no particular suspicion that Healy was underage, and observed no symptoms of alcohol consumption. RP 26-27, 51-52, 57. Presence in a high-crime area, or proximity to others suspected of criminal activity, does not justify a *Terry* detention. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). Gordon’s hunch that Healy was committing *some* crime is insufficient to warrant the stop. *See id.* at 63.

Because Gordon did not have reasonable suspicion that Healy had committed any crime, and because he did not have sufficient information

to cite Healy for urinating in public, he lacked authority of law to detain Healy. Consequently, Healy did not obstruct Gordon when he fled, because Gordon was not engaged in lawful police activity. *See State v. Barnes*, 96 Wn. App. 217, 225, 978 P.2d 1131 (1999) (“An unlawful detention is by definition not part of lawful police duties.”); *see also State v. Malone*, 106 Wn.2d 607, 611, 724 P.2d 364 (1986) (“police power can lawfully extend to prohibiting flight from an unlawful detention **where that flight indicates a wanton and willful disregard for the life and property of others.**”) (emphasis added).

For these reasons, the trial court’s conclusions that when he commanded Healy to stop, Gordon had probable cause to believe Healy had committed the infraction of urinating in public, as well as the crime of being a minor exhibiting the effects of consuming alcohol, are incorrect. Because Gordon lacked these bases to justify the detention, the trial court also erred in concluding that he had grounds to arrest Healy for obstructing when Healy did not immediately stop after Gordon told him to. Accordingly, the motion to suppress should have been granted.

VI. CONCLUSION

For the foregoing reasons, Healy respectfully requests that the court REVERSE the order denying his motion to suppress and DISMISS the conviction.

RESPECTFULLY SUBMITTED this 10 day of July, 2017.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Sean Healy
5820 11th Street SW
Mukilteo, WA 98275

Denis Paul Tracy
Whitman Co Prosecutor
PO Box 30
Colfax, WA 99111

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 10 day of July, 2017 in Walla Walla, Washington.


Breanna Eng

BURKHART & BURKHART, PLLC

July 10, 2017 - 3:48 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34511-4
Appellate Court Case Title: State of Washington v. Sean Michael Healy
Superior Court Case Number: 15-1-00161-7

The following documents have been uploaded:

- 345114_Briefs_20170710154752D3708449_5590.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Appellants Brief. Healy.pdf

A copy of the uploaded files will be sent to:

- amandap@co.whitman.wa.us
- denist@co.whitman.wa.us

Comments:

Appellant's Brief

Sender Name: Breanna Eng - Email: Breanna@BurkhartandBurkhart.com

Filing on Behalf of: Andrea Burkhart - Email: Andrea@BurkhartandBurkhart.com (Alternate Email:)

Address:
6 1/2 N. 2nd Ave., Ste. 200
Walla Walla, WA, 99362
Phone: (509) 529-0630

Note: The Filing Id is 20170710154752D3708449